IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

Chamber Summons No.1116 of 2007
in
Suit No.1845 of 1987

Mohini Rajkumar Seth ..Plaintiff

vs.

1. Jaypal Ramrao Kothare
and others ..Defendants

Mr.U.L.Maikhija for plaintiff.
Ms.Evento Gonsalves for defendant nos.1 and 3
Mr.Rajesh Shah for defendant no.5
Ms.Menon for defendant no.6

CORAM: S.C.DHARMADHIKARI J
6th September,2007

P.C.

1. Heard Ms.Gonsalves for defendant nos.1 and 3 in support and Mr.Makhija for plaintiff so also Mr.Shah for defendant no.5.

2. The relief prayed in this chamber summons is that defendant nos. 1 and 3 be permitted to file further affidavit of evidence of defendant no.3 together with further list of documents referred in the affidavit of evidence.

4. The circumstances in which this chamber summons is moved are set out in the affidavit in support.

5. Defendant No.3 does not deny that he had filed his affidavit of evidence which was in lieu of his examination in chief. That was done by him on 27th September, 2006. He does not dispute that he had filed the list of documents along with the said affidavit.

6. He does not dispute that the said affidavit has been taken on record and this Court has marked it as such. Accordingly, the plaintiff was informed to cross examine defendant no.3. However, the order passed by this Court on 2nd February, 2007 proceeds on the basis that the cross examination of this witness would not be done in Court and by consent of parties the Commissioner was appointed to record the evidence. In other words, the Commissioner appointed by this Court was to give opportunity to the plaintiff to cross examine defendant no.3 so also give opportunity to the defendants to examine further witnesses. The order passed this Court on 2nd February, 2007 reads thus:

> "1. Heard counsel for the parties.
>
> 2. By order dated 20th July, 2006, while framing issues the Court directed that the defendants should file the affidavit of

their evidence within 4 weeks.

3.Learned Counsel for the defendant no.2 states that in pursuance of the said order defendant no.1 and 3 have already produced on record all the documents on which they wish to rely upon and also the affidavit of Atul Ramrao Kothare, defendant no.3 in lieu of examination in chief.

4. Ms.J.Sidhva is appointed as Court Commissioner for recording the evidence. Court Commissioner is authorised to record cross examination of the defendant no.3 and also receive the affidavits of further witnesses, if any, whom any of the defendants wants to examine. After accepting the affidavits the Court Commissioner shall also record the cross examination of the said witnesses. On conclusion of the evidence of the defendants the Court Commissioner shall receive the affidavit of the plaintiffs and their witnesses and record the cross examination of the said witnesses.

5. The Court Commissioner is authorised to

fix the schedule of the commission work, including the date, time and venue of the cross examination of the witnesses. Court Commissioner shall complete the commission work as expeditiously as possible and submit his report periodically after cross examination of every witness is over. Ordinarily the Court Commissioner shall complete the cross examination of first witnesses within 12 weeks and thereafter further successive witnesses within 4 weeks each. Court Commissioner shall submit his report periodically after 8 weeks.

6. The plaintiff shall initially deposit a sum of Rs.5000/- and defendant nos. 1 and 3 together shall deposit Rs.5000/- towards the fees and expenses of the Court Commissioner.

7. Counsel for the plaintiff undertakes to inform this order to the Court Commissioner who shall act upon it upon such intimation. Court Commissioner is authorised to receive the record of the court under valid acknowledgement."

7. Now, the present chamber summons is filed and

the relief claimed is not just that some documents could not be filed in Court along with list because they were allegedly not available but the affidavit proceeds to state that it is necessary for the defendant nos.1 and 3 to file additional/further affidavit of evidence in lieu of examination in chief. The request is made on the basis that the Court Commissioner has been appointed to take evidence. The Court Commissioner has yet to commence recording evidence. That is cross examination of the deponent (defendant no.3). Therefore, no prejudice would be caused if this additional affidavit in lieu of examination in chief is taken on record and the parties thereafter proceed in accordance with the order dated 2nd February, 2007. In other words nothing has been done in pursuance of the order passed by this Court and, therefore, it is not as if opportunity sought for cannot be granted.

8. Ms.Gonsalves appearing in support of this chamber summons submits that the documents except the document at Sr.Nos. 13 to 15 have been exhibited by consent. The documents that are presently sought to be placed on record are certified copies of the plan, commencement certificates etc. They were received on 3rd

January, 2007. That is the reason why the chamber summons has been moved. Earlier affidavit is dated 27th September, 2006. Hence, no reference could be made to the further documents in the earlier affidavit. This being the position, she submits that the chamber summons be made absolute. She further submits that all these documents are extremely relevant for the purpose of resolving the controversy in the suit. She relies upon Order XVIII Rule 2 of the Code of Civil Procedure and submits that the defendants can bring their evidence at any time. There is no bar for such evidence. In any event, her submission is that this Court should exercise its inherent powers and permit the course of action which is suggested by her. She submits that ultimately the procedural provisions are directory in nature. Justice oriented approach is necessary to be adopted. In such circumstances, the reliefs prayed for be granted.

9. On the other hands, Mr.Makhija relies upon the order passed by this Court while framing the issues on 20th July, 2006. He relies upon Order 18 Rule 4 of the Code of Civil Procedure. He submits that it is immaterial whether the cross examination has actually commenced or not. For short, his

submission is that examination in chief of defendant no.3 is concluded. Once the examination in chief of defendant no.3 is concluded there is no warrant for accepting his further affidavit in lieu of examination in chief. That is the course which cannot be introduced in the provision. The intendment is not to curtail the right of the parties to lead evidence but to see that the witness who has already come and deposed is not recalled by the parties. The intention is not to permit such course save and except when the Court wants the witness to be recalled. In these circumstances, there are provisions in the Code of Civil Procedure which would not permit such course of action. In this behalf my attention is invited to Order XIII of the Code of Civil Procedure. According to Mr.Makhija, there is a specific object while deleting old Rule 2 therefrom. Once that is done, then, this course cannot be permitted. The chamber summons is, therefore, liable to be dismissed as misconceived.

10. The arguments of Mr.Makhija are adopted by Mr.Shah appearing for defendant no.5. He submits that no exception be made in the facts of this case because it is clear that if such a course is permitted in this case, it may affect other suits

and proceedings. Therefore, the chamber summons be dismissed.

11. Order XIII of the Code of Civil Procedure is dealing with the production, impounding and return of the documents. Earlier, Order XIII was worded thus:

> "1. Documentary evidence to be produced (at or before the settlement of issues):- (1) The parties or their pleaders shall produce, (at or before the settlement of issues), all the documentary evidence of every description in their possession or power, on which they intend to rely and which has not already been filed in Court, and all documents which the Court has ordered to be produced.
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> (2) The Court shall receive the documents so produced:
>
> Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.
>
> 2. Effect of non production of documents:-

> (1) No documentary evidence in the possession or power of any party which should have been but has not been, produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non production thereof; and the Court receiving any such evidence shall record the reasons for so doing.
>
> (2) Nothing in sub-rule (1) shall apply to documents: - (a) produced for the cross examination of the witness of the other party, or (b) handed over to a witness merely to refresh his memory."

12. Bare reading of the same would indicate that the parties or their pleaders shall produce at or before settlement of issues all documentary evidence of every description in their possession or power and on which they intend to rely and which has already been filed in Court and all documents which the Court has ordered to be produced. The proviso as reproduced above only states that the documents which are to be received by the Court

shall be contained in the accurate list.

13. Now Order XIII Rules (1) and (2) as they stood earlier have been deleted and instead order XIII Rule (1) has been inserted to include samething except taking away the powers of the Court to receive any evidence which has not been produced in accordance with the requirement of then prevailing Rule (1). In other words, at any subsequent stage of proceedings unless a good cause is shown to the satisfaction of the Court for non production thereof, the Court could have received any evidence after recording its reasoning which was the earlier position is now not existing. The new O.XIII reads thus:

> "1. Original documents to be produced at or before the settlement of issues: -(1) The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement.
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> (2) The Court shall receive the documents so produced:

> provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.
>
> (3) Nothing in sub-rule (1) shall apply to documents :- (a) produced for the cross examination of the witnesses of the other party; or (b) handed over to a witness merely to refresh his memory."

14. The intent of the Legislature in amending the Code has been noted by the Hon’ble Supreme Court of India in two decisions reported in A.I.R.2003 S.C.189 and A.I.R.2005 S.C.3353 (both in the matter of Salem Advocate Bar Association, Tamilnadu Vs. Union of India). In A.I.R.2003 S.C.1989 the Supreme Court has observed in para 21 of the report as under:

> "21. We find that in the Code of Civil Procedure, 1908, a provision similar to Rule 17A did not exist. This provision, as already noted, was inserted in 1976. The effect of the deletion of this provision in 2002 is merely to restore status quo ante, that is to say, the position which existed prior to the insertion of Rule 17-A in 1976.

> The remedy, if any, that was available to a litigant with regard to adducing additional evidence prior to 1976 would be available now and no more. It is quite evident that Rule 17-A has been deleted with a view that unnecessarily applications are not filed primarily with a view to prolong the trial."

In A.I.R. 2005 S.C.3353 the Supreme Court has observed thus in paras 14, 33 and 35 to 37 as under:

> "14. In Salem Advocates Bar Association's case, it has been clarified that on deletion of Order XVIII Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment i.e. 1st July, 2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even befroe insertion of Order XVIII Rule 17-A, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order XVIII Rule 17-A did not create any new right but only clarified the postition. Therefore, deletion of Order XVIII Rule 17-A

does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just."

"33. Order XVIII Rule 2(4) which was inserted by Act 104 of 1976 has been omitted by Act 46 of 1999. Under the said Rule, the Court could direct or permit any party, to examine any party or any witness at any stage. The effect of deletion is the restoration of the status quo ante. This measns that law that was prevalent prior to 1976 amendment, would govern. The principles as noticed hereinbefore in regard to deletion of Order XVIII, Rule 17(a) would apply to the deletion of this provision as well. Even prior to insertion of Order XVIII, Rule 2(4), such a permission could be granted by the Court in its discretion. The provision was inserted in 1976 by way of caution. The omission of Order XVIII, Rule

2(4) by 1999 amendment does not take away Court's inherent power to call for any witness at any stage either suo motu or onm the prayer of a party invoking the inherent powers of the Court."

35. Order VII, Rule 14 deals with production of documents which are the basis of the suit or the documents in plaintiff's possession or power. These documents are to be entered in the list of documents and produced in the Court with plaint. Orderr VII, Rule 14(3) requires leave of Court to be obtained for production of the documents later. Order VII, Rule 14(4) reads as under:

"Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

36. In the aforesaid Rule, it is evident that the words "plaintiff's witnesses" have been mentioned as a result of mistake seems to have been committed by the Legislature.

The words ought to be "defendant's witnesses". There is a similar provision in Order VIII Rule 1A(4) which applies to a defendant. It reads as under:

"Nothing in this rule shall apply to documents :-

(a) produced for the cross examination of the plaintiff's witnesses, or

(b) handed over to a witness merely to refresh his memory."

37. Order VII relates to the production of documents by the plaintiff whereas Order VIII relates to production of documents by the defendant. Under Order VIII Rule 1A(4) a document nor produced by defendant can be confronted to the plaintiff's witness during cross examination. Similarly, the plaintiff can also confront the defendant's witness with a dcoument during cross examiantion. By mistake instead of "defendant's witnesses", the words "plaintiff's witnesses" have been mentioned in Order VII Rule (4). To avoid any confusion, we direct

> that till the Legislature corrects the mistake, the words "plaintiff's witnesses" would be read as "defendant's witnesses" in Order VII Rule 4. We, however, hope that the mistake would be expeditiously corrected by the Legislature."

15. A bare perusal of the amended provision demonstrates that the parties can file copies of documents at the time of institution of the suit or filing of written statement. however, all originals have to be produced on or before settlement of issues. In the present case, admittedly, that stage is over and Commissioner is appointed to record cross examination.

16. Order XIV deals with the settlement of issues and determination of suit on issues of law or on issue agreed upon. Order XV provides for disposal of the suit at the first hearing. Order XVI deals with summoning and attendance of witnesses. Order XVII deals with adjournments. Then comes Order XVIII wherein rule (1) provides for right to begin. Order XVIII Rule (2) provides for statement and production of evidence. Sub-rule (1) of the same has been emphasised by Ms.Gonsalves to contend that the words "shall have a right to begin and produce

his evidence in support of the issues which he is bound to prove" would permit the application of the present nature being made. In other words, she submits that Order XIII deals with the documents specifically. Even after its amendment the same does not have any prohibition and if there to be one, the same is not mandatory because of the wording of Order XVIII Rule 2. In other words, all these are procedural provisions and, therefore, they are necessarily directory.

17. She also invokes the inherent powers of this Court and submits that since no prejudice would be caused to the parties further evidence on affidavit be permitted.

18. Ms.Gonsalves’s arguments overlooks another aspect namely deletion of O.XVIII Rule 17A from the Code of Civil Procedure. Earlier the production of evidence not previously known or which could not be produced despite due diligence could have been permitted by the Court to be produced at a later stage on such terms as may appear to be just. The deletion of this proviso appears to be deliberate. It is not as if the Court’s power is in any way being curtailed. However, the parties could not at any time and/or at subsequent/later stage request

the Court to allow production of evidence. The deletion is with a clear intent that the suit should be disposed of expeditiously. The hurdles or obstacles even under the procedural laws were affecting the disposal of the main matter/suit. In such circumstances and with a view to avoid unnecessary delay the legislature has stepped in and amended the Code exhaustively. It is with this intent that the production of documentary evidence is before the stage of settlement of issues; Any other wider question need not be gone into in the peculiar facts of this case.

19. Further, I am of the view that the order passed by this Court in the present suit denotes that the examination in chief of defendant no.3 has concluded. This aspect is not seriously disputed by Ms.Gonsalves. The order read as a whole clearly shows that the examination in chief in sofar as defendant no.3 is concerned is over and the evidence will have to be recorded before the Commissioner from the stage of his cross examination only. In these circumstances, that I am unable to accept the contention of Ms.Gonsalves.It would mean that the evidence which has already been concluded can be recommenced. In this case defendant no.3 having concluded his

examination in chief by filing the affidavit, now cannot urge that when the affidavit was filed, he could not produce all the documents. No reference is made to these documents in affidavit, no liberty was reserved to file them when received. It is not as if that the defendant had no knowledge of these documents. If he had further documents, it is not as if his right to lead evidence has been curtailed. The word "evidence" and particularly "his evidence" appearing in Order XVIII Rule 2 and emphasised by Ms.Gonsalves cannot be read in a restricted manner. It is not as if the party alone can depose before the Court. The words "His evidence" would mean entire oral and documentary evidence of a party. That can be produced through the party or his witnesses. A party, thus has permission to examine other witnesses as well. The sum total of all witnesses would constitute his oral evidence. In the present case, merely because the examination in chief of defendant no.3 is over and he would be subjected to cross examination now on his affidavit does not mean that his evidence is concluded straightway. He has been permitted to lead evidence by examining further witnesses. That is clear from order passed by Karnik J. In such circumstances, an opportunity is still available to have the documents which are referred to and relied

upon in the affidavit in support of the chamber summons to be placed on record of the suit. This documentary evidence has not been shut out straightway. Once the documentary evidence and opportunity to bring it is still available, then, I see no prejudice being caused to defendant nos.1 and 3. In any event, once the above intent appears from a reading of the provisions and order of this Court, no question arises of acedeing to the request of Ms.Gonsalves for exercise of inherent powers. Even otherwise I do not find this is a fit case for exercising them in any event at this stage.

20. Consequently reserving liberty to defendant no.3 to bring on record the documentary evidence by examining further witnesses this chamber summons is dismissed. However, there shall be no order as to costs.

21. Ms.Gonsalves states that some time may be granted to her to challenge this order. For this purpose, she submits that the proceedings before the Commissioner should not commence.

21. This request is opposed by Mr.Shah and Mr.Menon.

22. I see no prejudice being caused to defendant nos.1 and 3. All that the Commissioner would do is to proceed to record the evidence i.e. cross examination of defendant no.3. I am not sure whether the Commissioner has fixed any date of appearance of the parties. If the proceedings are not to commence immediately, then, defendant nos.1 and 3 have sufficient time to challenge this order. Request for stay of proceedings before the Commissioner is, therefore, misconceived and is rejected.

(S.C.DHARMADHIKARI J.)